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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOYCE WOODALL AND CONCERNED WOMEN FOR AMERICA, INC.
Petitioners,

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES AND UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

KEITH A. FOURNIER
The American Center for
Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

THOMAS P. MONAGHAN
The American Center for
Law & Justice
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

JAMES M. HENDERSON, SR.*
The American Center for
Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

* *Counsel of Record*

Attorneys for Amicus Curiae

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v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
AND UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS*

The American Center for Law and Justice is a nonprofit corporation. The ACLJ provides educational materials on matters related to religious liberties, civil rights and the interests of families in America. The ACLJ also provides litigation services in selected cases of concern in the area of religious liberty, the right to life and the interests of families.

A key area of concern for the ACLJ is the problem of legitimized, legalized abortion in America. When this Court announced *Roe v. Wade*, 410 U.S. 113 (1973), it could not put either opposition to abortion services or opposition to the "legitimization" or "legalization" of abortion beyond the pale

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* The parties have indicated their consent to the filing of this brief by letters filed herewith.

of public debate and discussion. The ACLJ is confident that this Court never considered that *Roe* served to utterly and finally settle matters of national policy regarding abortion.[1] Much of the litigation in which the ACLJ has been, or now is, involved, however, reflects the obvious, mistaken belief that the right to freedom of speech does not accord its fulsome protections to those who advocate on behalf of unborn children. Consequently, the ACLJ experiences no poverty of clients whose public oral and written advocacy for the lives of unborn children have been wrongly limited by private parties and government agencies.

ACLJ attorneys have represented participants in many legal skirmishes resulting from nonviolent protests against abortion businesses and against the continued legality of abortion, including *Bray v. Alexandria Women's Health Clinic*, 122 L.Ed.2d 34 (1992), and *National Organization for Women v. Joseph Scheidler*, 127 L.Ed.2d 99 (1994). The ACLJ currently represents several parties in facial challenges to the Freedom of Access to Clinic Entrances Act (hereafter,

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1 Certainly, the candid jurist

> must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in *ordinary litigation* between parties, in *personal actions*, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Inaugural Address by Abraham Lincoln (March 4, 1861) INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES OF AMERICA FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989 at 139 (Bicentennial Ed. 1989) (emphasis added).

"FACE")[2] and is defending others who have been targetted with civil suits under FACE.[3]

REASONS FOR GRANTING THE WRIT

An entire spectrum of protected speech activities can be interpreted by thin-skinned individuals, or political opponents, as "threatening" or "intimidating" under FACE. In an amicus brief submitted to this Court by the United States in the case of *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994), the Solicitor General argued that sign displays near abortion facilities could be prohibited, *Brief Amicus Curiae of the United States* at 25,[4] that literature distribution in front of abortion facilities could be prohibited unless prior consent was received, DOJ Amicus at 24, and that a neighborhood could be cordoned off from First Amendment activities simply because an abortion business employee resides there. DOJ Amicus at 19, 25. Despite the miserly approach of the Department of Justice in *Madsen*, this Court found those prohibitions to be unconstitutional abridgements of free speech.

Here, however, the Fourth Circuit failed to account for the ponderous burden that FACE inflicts on protected, but ominous, expression. For that reason, this Court should grant the petition for a writ of certiorari.

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2 *Terry v. Reno*, No. 94-1154(HIIG) (D.D.C. filed May 26, 1994); *Hoffman v. Hunt*, No. 3:93CV393-P (W.D.N.C. proceedings stayed Nov. 29, 1994); *Reily v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994).

3 *Milwaukee Women's Medical Services, Inc. v. Brock*, No. 94-C-0793 (E.D. Wis. filed July 18, 1994).

4 Hereafter that brief is referred to as "DOJ Amicus."

I. FACE REGULATES SPEECH AND EXPRESSIVE CONDUCT ACCORDING TO VIEWPOINT AND CONTENT

Diogenes would extinguish his lamp if either the Department of Justice or the Fourth Circuit below would simply acknowledge that Congress passed FACE and the President signed it in a direct effort to suppress one protest movement, the anti-abortion movement. Representative Sensenbrenner said:

> I fear that the bill that has been reported from the subcommittee tramples on first amendment rights of protesters. The first amendment was not designed to protect politically correct speech, and the reason I feel this very, very strongly is that if during the 1960's, we had legislation like this that took a specific side on a specific issue, there may not have been a civil rights revolution in this country. The reason this bill is so constitutionally suspect is that it singles out people who are on one side of abortion and attempts to restrict their free speech. If it were an across-the-board prohibition of certain types of activity, there would not be constitutional problems with it.

Hearings Before the Subcomm. on Crime and Justice of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 5 (June 10, 1993).

But, if the congressman was correct, FACE protects an abortion liberty this Court trampled on recently, when it stated that the abortion liberty is a "woman's right to make the ultimate decision, *not a right to be insulated from all others in doing so.*" *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2821 (1992) (joint

opinion) (emphasis added). The chilling impact on anti-abortion rhetoric seems a deliberate result of the enactment of FACE, but whether intended or not, the impact certainly was a predictable aspect of the struggle between two strongly conflicted political perspectives on the right to abort unborn babies.[5]

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5 President Lincoln certainly expected that the seemingly intractable conflict between the pro-freedom and pro-slavery forces would lead to pressure to silence anti-slavery sentiments:

> The question recurs, what will satisfy them? Simply this: We must not only let them alone, but we must, somehow, convince them that we do let them alone. This, we know by experience, is no easy task. . . . [N]atural, and apparently adequate means all failing, what will convince them? This, and this only: cease to call slavery *wrong*, and join them in calling it *right*. And this must be done thoroughly—done in *acts* as well as in *words*. Silence will not be tolerated—we must place ourselves avowedly with them. Senator Douglas's new sedition law must be enacted and enforced, suppressing all declarations that slavery is wrong, whether made in politics, in presses, in pulpits, or in private. . . . The whole atmosphere must be disinfected from all taint of opposition to slavery, before they will cease to believe that all their troubles proceed from us. . . . Holding, as they do, that slavery is morally right, and socially elevating, they cannotcease to demand a full national recognition of it, as a legal right, and a social blessing.

Address by Abraham Lincoln to the Cooper Institute of New York (Feb. 27, 1860) (*reprinted in* THE PORTABLE ABRAHAM LINCOLN at 167, 184-86 (A. Delbanco ed. 1992). FACE is simply Senator Douglas' sedition law dressed up in new, pro-abortion rhetoric.

A. FACE's Selective Prohibitions On Abortion Protest Are Unconstitutional

In *R.A.V. v. City of St. Paul*, 120 L.Ed.2d 305 (1992), this Court found a strikingly similar kind of speech restriction unconstitutional. The City of St. Paul enacted a "hate crimes" ordinance punishing conduct that aroused "anger, alarm or resentment in others." R.A.V. was prosecuted under the ordinance for burning a cross on the lawn of an African-American family. 120 L.Ed.2d at 315. Holding the ordinance unconstitutional, this Court stated, the "First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." 120 L.Ed.2d at 323. But that precise approach is embodied in FACE, which selectively targets *anti-abortion* activity at abortion facilities.

Some would argue, we think disengenuously, that FACE does not select out certain "bad" motivations for punishment. The lie is put to such assertions with a simple illustration, involving a multi-tenant medical center with three entrances. At one entrance, animal rights activists are blocking the door to halt mistreatment of laboratory animals at a research lab inside the center. At a second entrance, labor union members are holding a sit-down strike blocking the door to protest unfair wages for maintenance workers in the center. At a third entrance, anti-abortion activists are conducting a "sit-in" to protest abortions at a business inside the center. Obviously, FACE punishes only the *anti-abortion* activists at the third entrance.

Obviously, the restrictions that operate near reproductive health facilities in FACE apply only to those motivated by opposition to abortion. Title 18 § 248(a)(1). That selection and punishment, based alone on viewpoint, contradicts this Court's

holding in *R.A.V.* Rejecting just such categorical restrictions on speech, this Court has said:

> Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. *That possibility would alone be enough to render the ordinance presumptively invalid,* but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

120 L.Ed.2d at 325 (emphasis added).

Because FACE affects only those motivated by opposition to abortion, all justifications for its constitutionality are suspect. The "danger of censorship" it presents, *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), requires that it be employed only where it is "necessary to serve the asserted compelling interest." *R.A.V.*, 120 L.Ed.2d at 326 (internal quotation marks and brackets omitted).

FACE "imposes special prohibitions on those speakers who express views on disfavored subjects" and on the basis of "hostility -- or favoritism -- towards the underlying message." That approach is unconstitutional. *R.A.V.*, 112 S.Ct. at 2547-2549. *See also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (see cases cited).

The Fourth Circuit ignored a key distinction between a content-based law and a facially neutral law: particularized hostility to a certain viewpoint. In doing so, the Fourth Circuit disobeyed this Court's instruction, in *Ward v. Rock*

Against Racism, 491 U.S. 781 (1981), that a time, place, or manner restriction can only be "justified without reference to the content of the speech." *Id.* at 791 (internal quotation marks omitted). Thus, FACE, by definition, is not a reasonable time, place, or manner restriction because it only applies to a specific form of expression - abortion protest.[6]

Nonverbal expressive activities can be banned, but not because of ideas expressed. *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). FACE regulates speech based on hostility - or favoritism - towards the underlying expression. *Compare Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding, against a facial challenge, a content-neutral ban on targeted residential picketing) with *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing). The rationale barring content-prohibition is that it "rais[es] the specter that Government may effectively drive certain ideas or viewpoints from the marketplace." *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. at 530, 536 (1980).

The central focus of FACE is abortion protest outside of abortion facilities. At its essence, FACE (like the statute in *R.A.V.*) is unconstitutional because it targets one type of speech. By making protest against abortion a federal crime, Congress displayed an unconstitutional bias against a particular protest movement. "[T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment

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6 Church protest is also prohibited under FACE.

forbids." 120 L.Ed.2d at 326. Certainly, Congress had "sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.*

B. FACE Chills Protected Speech

This Court has long recognized that the protection of free speech "does not end at the spoken or written word." *Johnson*, 491 U.S. at 404. The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974). *E.g.*, *Johnson*, *supra*, (First Amendment precludes prosecution for burning an American flag); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969) (students' wearing of black armbands to protest American military involvement in Vietnam constituted protected speech); *R.A.V.*, 112 S.Ct. at 2547 (cross burning is symbolic expression protected by the First Amendment).

The First Amendment also protects public statements on political and social issues that are vitriolic, coercive, and intimidating. It has been long held that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Speech

that is "intended to exercise a coercive impact" and is "offensive to others" still enjoys full constitutional protection. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Indeed, intimidating political expression is constitutionally protected speech. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[7] Moreover, if inflammatory, anti-abortion rhetoric offends and is emotionally unsettling, "that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

FACE creates an irrebutable presumption that anti-abortion speech outside abortion facilities can be chilled and even punished. Such an approach is contrary to this Court's decisions. The Fourth Circuit's conclusion to the contrary was error and this Court should grant the petition so that it may review and reverse that error.

C. FACE is an Unconstitutional Content-Based Restriction on Expression

FACE prohibits threatening conduct that is intended to intimidate or interfere with persons seeking to obtain or provide reproductive health services. See Title 18 U.S.C. §

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7 As this Court stated over twenty years ago, "undifferentiated fear or apprehension of disturbance" cannot justify suppressing "the right to freedom of expression." *Tinker*, 393 U.S. at 505. With *Tinker*'s "undifferentiated fear" contrast advocacy unprotected because it "directed to inciting or producing imminent lawless action" and it is "likely to incite or produce such action...." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

248(a). As used in FACE, "reproductive health services" is simply a euphemism for "abortion services." See Title 18 U.S.C § 248(e)(5) (defining "reproductive health services"). FACE accomplishes its goal by criminalizing all expressive conduct that constitutes a "threat of force" that "intentionally ... intimidates ... or attempts to ... intimidate ... any person ... obtaining or providing reproductive health services" (abortions). Title 18 U.S.C. § 248(a)(1). FACE defines "intimidate" as, "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." Title 18 U.S.C. § 248(e)(3).

Thus, FACE criminalizes anti-abortion "threats" if they "intimidate" by placing any other persons (not necessarily themselves) in "reasonable apprehension" of harm to someone. Whether FACE renders anti-abortion speech criminal, therefore, depends on the likely communicative impact of the words on the recipient. Such a restriction on speech is not content neutral, and is therefore unconstitutional, when it is based on the impact of the communication on its audience. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 112 S.Ct. 2395, 2403 (1992) ("Listeners' reaction to speech is not a content neutral basis for regulation"); *Johnson*, 491 U.S. at 412; *Boos v. Barry*, 485 U.S. 312, 321 (1988).

FACE is a direct restriction on anti-abortion speech that "intimidates" by creating a subjective "reasonable apprehension" of "bodily harm" to someone. Because FACE turns on the "emotive impact of speech on its audience," which directly relates "to the content of the expression itself," it is unconstitutional. *Johnson*, 491 U.S. at 411. In *Boos*, this Court held that the need to protect the dignity of foreign diplomats by shielding them from critical speech would not justify an ordinance prohibiting sign displays within 500 feet

of a foreign embassy if the sign tended to bring the foreign government into "public odium" or "public disagreement." 485 U.S. at 315, 321 (plurality opinion). *Boos* held that a law was not content neutral because it focused on the content of the speech and its impact on auditors. *Id.* at 320-21, 334-35. Then, in *Johnson*, this Court struck down a conviction arising from a flag burning. 491 U.S. at 420. The demonstrator was convicted under a statute that prohibited the desecration of the national flag. *Id.* at 400 n.1. This Court concluded that the statute was content-based because the application of the law depended on the "likely communicative impact" of the expressive conduct. *Id.* at 411.

The ban on "intimidating" with "threats" that create a "reasonable apprehension" turns on the communicative and emotive impact of speech on its recipient. Thus, under *Johnson* and *Boos*, FACE's ban on such communications is related to the suppression of unwanted "intimidating" expression. FACE relies on the reaction and perception of viewers and listeners to speech as an inherent aspect of the law. For this reason, it is unconstitutional. *Id.*

D. FACE Lumps "Elements of Majesty" and "Elements of Criminality" in a Single Prohibition On Anti-abortion Activism, Ignoring this Court's Teaching In *NAACP v. Claiborne Hardware Co.*

"[T]he mere advocacy of use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927. In *Claiborne Hardware*, this Court applied these principles to specific expressive conduct that would be banned under FACE. *Claiborne Hardware* involved an emotional and sometimes violent boycott of white-owned businesses in

Mississippi in 1966, led by the NAACP. The boycott was intended to force "political, social, and economic change." 458 U.S. at 911. Charles Evers was the leading figure in the boycott. In his speeches, Evers "told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him . . . [and] that any `uncle toms' who broke the boycott would have their necks broken by their own people." *Id.* at 900 n.28 (emphasis in original).[8]

Although the "First Amendment does not protect violence," *id.* at 916, this Court held that Evers' intimidating harangues and the frightful and ominous behavior of the "black hats" were protected by the First Amendment. To support its holding that such public utterances were protected, *id.* at 921, this Court analyzed the *Claiborne* injunction in a manner which ought to be used in reviewing FACE. The Court reaffirmed that "[s]peech does not lose its protected

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8 Evers also threatened: "`If we catch any of you going to any of them racist stores, we're gonna break your damn neck'." *Id.* at 902. These threats were combined with the placement of "store watchers" known as "Black Hats" who "stood outside the boycotted stores and identified those who traded with the [white] merchants." *Id.* at 903. There were numerous violent incidents that occurred to persons who ignored the boycott. "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged." *Id.* at 904. A "black couple," after shopping in a "white-owned dry cleaner," had "shots fired into their home." *Id.* at 905. A black "commercial fisherman who did not observe the boycott" was "grabbed" by "four men" and was "beat . . . up." *Id.* A "group of young blacks apparently pulled down the overalls of an elderly brick mason known as `Preacher White' and spanked him for not observing the boycott." *Id.* at 905; *see also* 458 U.S. at 905 n.37.

character ... simply because it may ... coerce ... [others] into action." *Id.* at 910. Rather, "'offensive' and `coercive' speech [is] ... protected by the First Amendment...." *Id.* at 911. "[L]anguage in the political arena, like the language in labor disputes ... is often vituperative, abusive, and inexact." *Id.* at 911 n.46.

This Court directly addressed the "acts of violence [that had] occurred," stating that "violence has no sanctuary in the First Amendment[,]" *id.* at 916, but then noted, "[w]hen such conduct occurs in the context of constitutionally protected activity ... 'precision of regulation' is demanded." *Id.* (citations omitted). "[T]he presence of activity protected by the First Amendment imposes restraints" on the ability of government to sanction it. *Id.*

This Court acknowledged that Evers' speeches were threatening, and that the First Amendment would not protect such expression if it was "likely to incite lawless action" or if "the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats." *Id.* at 927. It was undeniable that Evers had menaced boycott violators, and that his speeches "might have been understood as inviting an unlawful form of discipline or ... as intending to create a fear of violence." *Id.*

Nevertheless, this Court held that the threats did not constitute *Brandenburg* "incitement;" the intimidating threats of bodily harm were not "directed to inciting or producing imminent lawless action" and were not "likely to incite or produce such action." *Id.* at 928 (citation omitted). This Court stated, "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *Id.* at 926. "Evers' speeches did not transcend

the bounds of protected speech set forth in Brandenburg." *Id.* at 928.

The crucial missing element necessary to reach "incitement" was temporal proximity between the acts of violence and Evers' speeches. "If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." *Id.* at 928. But "[t]he acts of violence . . . occurred weeks or months after the April 1, 1966, speech." *id.* When threats of violence "do not incite lawless action, they must be regarded as protected speech." *Id.*

This is the glaring constitutional defect in FACE. It criminalizes a variety of "threats" to do "bodily harm" without regard to whether such threats "incite" or even cause the harm. In fact, it punishes mere threats that place a "person in reasonable apprehension of bodily harm" in the complete absence of such harm.

In *Claiborne Hardware*, because there was no evidence -- beyond the mere threats in his speeches -- that Evers was personally involved in any of the violent conduct, his speeches could not be taken as specific evidence in the carrying out of violence. *Id.* at 929. Yet, Evers' threatening and intimidating speeches would have plainly violated the prohibitions of FACE. For this reason, FACE cannot be squared constitutionally with the First Amendment. The Fourth Circuit's decision below failed to account for the inherent conflict between *Claiborne Hardware* and FACE.

II. FACE IS UNCONSTITUTIONALLY VAGUE

FACE is unconstitutionally vague. "First Amendment

freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). As a result, "the First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston v. Hill*, 482 U.S. 451, 472 (1987). A statute is unconstitutionally vague where its terms are "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967) (original quotation marks omitted).

This Court has emphasized that an especially stringent standard must be applied to laws touching on First Amendment freedoms. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-110 (1972). Vagueness is a vice in First Amendment contexts because, when one cannot be certain whether or not his conduct is prohibited by a statute, there is exerted a powerful chilling effect on a wide range of protected First Amendment activity. FACE leads "persons whose expression is constitutionally protected" to "refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). FACE works a multiplication of injuries through vagueness.

"**Force or Threat of Force**" *See* Title 18 U.S.C. § 248(a). Does this phrase include a nonviolent "sit-in?" If a protestor *insists* on calling an abortion provider a murderer, is that use of "force or threat of force"? What of the street evangelist who warns an abortion businessman that his participation in abortion services will cause him to go to Hell?

"**Physical Obstruction**" *See* Title 18 U.S.C. §§ 248(a)

and 248(e)(4). What does it mean to render passage to or from a facility "unreasonably difficult?" Title 18 U.S.C. § 248(e)(4). Is it "unreasonably difficult" to walk past a picket line of smiling, nonviolent protestors?[9] Is it "unreasonably difficult" to have to walk around a persistent sidewalk counselor? Perhaps having to step over people engaged in a "sit-in" is "unreasonably difficult?"

"**Injures**" Title 18 U.S.C. § 248(a) refers to "injures" but § 248(b) refers to "bodily injury." Therefore, the verb "injures" standing alone apparently includes causing other, non-bodily injuries. Does this include any legal injury? Financial harm? Emotional distress? Injury to constitutional rights?

"**Intimidates**" The phrase "reasonable apprehension of bodily harm to him- or herself or to another" opens up a range of possible meanings. *See* Title 18 U.S.C. § 248(e)(3). Does the "harm" have to be proximately caused by the FACE defendant, as in a physical battery? Or are potential medical complications enough? Can an abortion facility employee claim "reasonable apprehension" that picketers might deter a woman who "needs" an abortion for medical reasons? Are the potential complications of childbirth "bodily harm" that abortion advocates may "reasonably apprehend" from any anti-abortion activities whatsoever outside an abortion facility? Does harm to anti-abortion protestors count? Does "intimidation" include the anti-abortion activist who locks himself by the neck to a concrete block, causing abortion

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9 This Court has held that the Constitution affords persons the opportunity to win the attention of the listener. *Kovacs v. Cooper*, 336 U.S. 921 (1949). If "physical obstruction" means merely being forced to walk around a pro-life leafletter, it is plainly unconstitutional.

facility agents to "apprehend bodily harm" to the anti-abortion activist?

"Interfere With" FACE defines this term as "restrict[ing] a person's freedom of movement." Title 18 U.S.C. § 248(e)(2). But by merely existing and occupying space, everyone necessarily "restricts the freedom of movement" of everyone else by diminishing the space available for movement. While a literal interpretation of this text is clearly absurd, where is the line to be drawn? Does "interference" include standing in someone's way? Standing in the middle of a sidewalk? Standing anywhere on a sidewalk? Taking part in a group gathering or picket line that forces persons to walk around it?

The pervasive ambiguity of these statutory terms is not mere academics. Rather, FACE's vagueness has considerable practical significance. Those who wish to distribute literature or speak with passersby about abortion alternatives must act at their peril when present near abortion businesses. Indeed, this problem is multiplied by the sheer enormity of the penalties attached to guessing wrongly -- up to six months in prison for a single nonviolent violation and eighteen months for second or subsequent nonviolent offenses, to say nothing of civil remedies and attorneys fees. Title 18 U.S.C. §§ 248(b) and 248(c).

Moreover, if "obstruction" represents a separate offense for each person obstructed, the amount of possible prison time becomes a function of the number of complaining abortion facility patrons and employees. Given that a violation could consist of entirely peaceful protest activity (and, except for the prohibitions of FACE, entirely lawful activity), the chilling effect on protected speech of such disproportionately severe penalties cannot be understated. If ever there were a case where "persons whose expression is constitutionally protected

... refrain[ing] from exercising their rights [of freedom of speech] for fear of criminal sanctions provided by a statute susceptible of application to protected expression," this is one. *Gooding*, 405 U.S. at 521.

We do not say that the First Amendment grants a right to block free ingress and egress to and from a facility open to the public. *See Cameron v. Johnson*, 390 U.S. 611 (1968). Rather, the First Amendment requires great precision of regulation in this area. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 499. FACE lacks such precision.

Criminal statutes restricting speech that turn on the reactions of others to unwanted speech, they are, as a matter of law, unconstitutionally vague. *Coates v. Cincinnati*, 402 U.S. 611, 611-14 (1971). FACE, of course, is intended to protect persons from threatening communications that are "intimidating." Where the lawfulness of speech turns on the reactions of others, the law is unconstitutionally vague. In *Coates*, this Court struck down an ordinance making it a crime for "three or more persons to ... conduct themselves in a manner annoying to persons passing by ...." *Coates*, 402 U.S. at 611. Like the defendants in *Coates*, anti-abortion speakers will not know if they are subject to criminal liability until others claim "intimidation" and "apprehension." Indeed, advocates for unborn children will not know whether the "apprehension" was legally "reasonable" until after they are arrested and tried. When a statute that criminalizes speech turns on such subjective and ad hoc determinations, it is unconstitutionally vague. *Grayned*, 408 U.S. at 108-09.

CONCLUSION

This Court has granted review on certiorari in another matter, *United States v. Lopez*, No. 93-1260, which addresses

the question of congressional authority under the Commerce Clause. The Court should hold the petition in this case, pending the outcome of *Lopez*, and then should grant the petition, vacate the judgment below, and remand for further consideration in light of *Lopez*. In the alternative, the Court should grant the Petition for a Writ of Certiorari and set the case for plenary review.

Respectfully submitted,

KEITH A. FOURNIER
The American Center for
Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

THOMAS P. MONAGHAN
The American Center for
Law & Justice
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

JAMES M. HENDERSON, SR.
Counsel of Record
The American Center for
Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

Attorneys for Amicus Curiae

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